

A LAW UNTO THEMSELVES? WHAT PLACE FOR MUSLIM FAMILY LAW IN AMERICA AND OTHER DEMOCRACIES

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In November 2010, Oklahoma voters approved a state constitutional amendment banning the use of Muslim Shari'a and other international laws in its state courts. This was a direct rejoinder to other Western nations allowing Muslim citizens to enforce Muslim marriage contracts in state courts and to resolve family law issues before Shari'a tribunals without state interference. Oklahoma's citizens wanted none of it, and voted to ban the use of Shari'a altogether. Twelve other states are discussing comparable measures.

In January 2012, however, a federal appeals court upheld a lower federal court injunction of Oklahoma's amendment. Singling out a specific religious law for special prohibition, the court of appeals concluded, amounted to blatant religious discrimination that violated the First Amendment Establishment Clause and unjustifiably injured Oklahoma's Muslim citizens. This leaves Oklahoma courts with a stark choice: allow Muslims to use Shari'a to govern their internal religious affairs and the private lives of their voluntary members, or equally prohibit all religious groups from exercising comparable authority - including Christian, Jewish and other religious communities who operate mediation and arbitration centers and maintain internal forms and forums of religious law and discipline.

Oklahoma can likely escape this choice by crafting a more neutrally-phrased constitutional amendment. But deft legal drafting will not end the matter. As American Muslims grow stronger and anti-Muslim sentiment in America goes deeper, constitutional and cultural battles over Muslim laws and tribunals will likely escalate.

Many Shari'a advocates reject America's sexual revolution of the past half century, built on cultural and constitutional ideals of sexual privacy, equality, and autonomy. They reject the easy-in/easy-out system of American family law that has brought ruin to many women and children. They reject America's legal protections for non-marital sex, sodomy, abortion, and same-sex marriage. Distrusting the modern liberal state's capacity to reform its laws of sexuality, marriage, and family life, Shari'a advocates want out. They have two main objectives: to give Muslim individuals the right to opt out of the state's liberal family law into their own religious community's more morally rigorous system; and to give Muslim religious officials the right to operate that system for voluntary members without undue state interference or review. Some advocates want separate Muslim arbitration tribunals that operate alongside the state. Others want independent Shari'a courts akin to those of native American tribes or those of modern day India. Some are pressing for gradual, piecemeal accommodations of Muslim family law, fearing the dominance of one form of Shari'a over another. Others want more rapid and wholesale change in pursuit of what they call "family law pluralism." But the bottom line is the same: to allow Muslim communities to become more of a law unto themselves in the governance of marriage and family life.

For the past decade, law journals, blogs, and conferences have been full of sophisticated papers pressing this case. Readers can get good sampling of the pros and cons of these arguments in two superb new anthologies: Rex Ahdar and Nicholas Aroney, ed., *Sharia in the West* (2010) and Joel Nichols, ed., *Marriage and Divorce in a Multicultural Context* (2012).

The three most prominent arguments for the use of Shari'a family norms and procedures in America and the rest of the West are based on religious freedom, political liberalism, and

non-discrimination. Though each argument seems plausible on the surface, they are all, to my mind, fundamentally flawed.

SHARI'A AND RELIGIOUS FREEDOM

The first argument for Shari'a centers on religious freedom. Both Western constitutional laws and international human rights norms give robust protection to the religious freedom of individuals and groups. Why deny peaceable Muslim citizens the freedom to opt out of state laws on sex, marriage, and family that run afoul of their central faith commandments? Why deny them the freedom to order their domestic lives according to their own religious norms? Doesn't freedom of religion protect a sincere Muslim against court actions on divorce, discipline, or child custody that directly contradict the rules of Shari'a? Doesn't it empower a pious Muslim man to take four wives into his loving permanent care, in imitation of the Prophet, especially since his secular counterpart can live with four women at once and then walk out scot free?

This argument falsely assumes that claims of conscience and religious free exercise must always trump. But this is hardly the case in modern democracies, even though religious freedom is cherished. Even the most sincere and zealous conscientious objectors must pay taxes, register properties, answer subpoenas, obey court orders, answer military conscriptions (even if by non-combat duty), and abide by many other general laws that they may not in good conscience wish to obey. If they persist in their claims of conscience, they must either leave the country or go to prison for contempt. Even the most devout religious believer enjoys no immunity from criminal laws against activities like polygamy, child marriage, female genital mutilation, or corporal discipline of wives. Religious freedom is not a license to engage in crime.

Muslims who are conscientiously opposed to liberal Western laws of sex, marriage, and family are certainly free to ignore them. They can live chaste private lives in accordance with Shari'a and decline to register their religious marriages with the state. Constitutional rights of privacy and sexual autonomy protect that choice, so long as their conduct is truly consensual. But that choice

also leaves their family entirely without the protections, rights, and privileges available through the state's complex laws of marriage and family, marital property and inheritance, social welfare, insurance, and more. And if minor children are involved, the state will intervene to ensure their protection, support, and education, hearing nothing of free exercise objections from parents or community leaders. Western Muslims enjoy the same religious freedom as everyone else, but some of the special accommodations pressed by some Muslim advocates today are simply beyond the pale for most Western democracies.

Even further beyond the pale is the argument that corporate religious freedom gives religious officials the power to govern the sex, marriage, and family lives of their voluntary faithful. Most Western democracies readily allow religious officials to preside at weddings, testify in divorce cases, assist in the adoption of a child, facilitate the rescue of a distressed family member, and the like. Some democracies also will uphold religious arbitration awards and mediation settlements over domestic issues. But that is a long way from delegating full legal power to religious bodies for governing the domestic affairs of their voluntary faithful in accordance with their own religious laws. No democratic state can readily allow a competing sovereign authority to govern such a vital area of life for its citizens. Family law is too interwoven with other public, private, procedural, and penal laws. And too many other rights and duties of citizens turn on a person's marital and familial status. Surely a democratic citizen's status, entitlements, and rights cannot turn on the judgments of a religious authority that has none of the due process and other procedural constraints of a state tribunal.

Some advocates proudly claim that Shari'a provides a time-tested and comprehensive law governing all aspects of sex, marriage, and family life. For some, that's an even stronger strike against its accommodation. Once a state takes the first step down that slippery slope, skeptics argue, nothing can prevent the gradual development of a rival religious law over sex, marriage, and family life, particularly as Muslim communities grow larger and more politically powerful. That was why Oklahoma prohibited the use

of Shari'a altogether. And that's why other common law lands—Australia, Canada, New Zealand, and the United Kingdom—are now pressing for the same restrictions.

SHARI'A AND CLASSICAL LIBERALISM

A second argument for Shari'ah appeals to the philosophical heart of American constitutional law: classical political liberalism. Under classic liberalism, marriage is a pre-political and pre-legal institution; it comes before the state and its positive laws both in historical development and in ontological priority. In his *Two Treatises on Government* (ca. 1690), John Locke called the marital contract “the first contract” and “the first society” to be formed as men and women emerged from the state of nature. Only upon the foundation of stable marriage contracts was the broader social contract built, and thereafter contracts to form governments and other associations. If marriage precedes the state, the argument goes, why should the state get exclusive jurisdiction over it? After all, it was 16th-century Protestants, not the 18th-century Enlightenment that gave the state the power to govern marriage and family life. Before the Protestant Reformation—and in many Catholic lands well after the Reformation, too—the Catholic Church's canon law and church courts governed marriage, family, and sexuality. Moreover, even in Protestant England until 1857, the state delegated a number of marriage and family law questions to church courts. Nothing, evidently, dictates that Western marriage and family law be administered by the state. And nothing in liberalism's contractarian logic requires marital couples to choose the state, rather than their own families or religious communities, to govern their domestic lives—particularly when the state's liberal rules diverge so widely from their own beliefs and practices.

This argument, while clever, is incomplete. It ignores another elementary teaching of classical liberalism: namely, that only the state, and no other social or private association, can hold the coercive power of the sword. In liberal democracies, the people grant to government this coercive power over individuals, but only in exchange for strict guarantees of due process of law, equal protection

under the law, and respect for fundamental rights. A comprehensive system of marriage and family law—let alone the many related legal systems of inheritance, trusts, family property, children's rights, education, social welfare, and more—cannot long operate without coercive power. The law needs police, prosecutors, and prisons; subpoenas, fines, and contempt orders; material, physical, and corporal sanctions. Moral suasion and example, coupled with communal approbation and censure, can certainly do part of the work. But a properly functioning marriage and family law system, in our porous and transient society that guarantees the fundamental right to travel, ultimately requires all these coercive instruments of government. And no religious authority can hold the power of the sword.

SHARI'A AND RELIGIOUS LIBERTY

The third argument for Shari'a family law appeals to norms of religious equality and non-discrimination. After all, many Western Christians have religious tribunals to govern their internal affairs, including some family matters. State courts will respect their judgments, even if their cases are appealed to Rome, Canterbury, or Moscow. No one is talking of abolishing these Christian church courts or trimming their power. No one seems to think these Christian tribunals are illegitimate, even when some of them seem to discriminate against women in decisions about ordination and church leadership. Similarly, Jews are given wide authority to operate Jewish law courts to arbitrate marital, financial, and other disputes. Indeed, in New York State by statute, and in several American states and European nations by custom, courts will not issue a civil divorce to an Orthodox Jewish couple unless and until the Jewish law court, the *beth din*, issues a religious divorce, even though Jewish law systematically discriminates against the wife's right to divorce. If Christians can have their canon laws and consistory courts, and Jews their Halacha and *beth din*, then why can't Muslims use Shari'a and Islamic courts?

This argument takes more effort to parry. A useful starting point is the quip of United States Supreme Justice Oliver Wendell

Holmes, Jr.: “The life of the law has not been logic but experience.” Holmes’s adage has bearing on this issue. The current accommodations made to the alternative legal systems of Christians, Jews, First Peoples, and others in the West were not born overnight. They came only after centuries of sometimes hard and cruel experience, with gradual adjustments and accommodations on both sides.

The gradual accommodation of Jewish law is particularly instructive. It is discomfiting but essential to remember that Jews were the perennial pariahs of the West for nearly two millennia, consigned at best to second-class status, and periodically subject to waves of brutality—whether imposed by Germanic purges, medieval pogroms, early modern massacres, or the 20th-century Holocaust. Living in perennial diaspora since the destruction of Jerusalem in A.D. 70, Jews have experienced a wide variety of legal cultures in the West and well beyond. After the third century, the Rabbis developed the important concept of *dina d’malkhuta dina* (“the law of the community is the law”). This meant that Jews accepted the law of the legitimate and peaceful secular ruler who hosted them as the law of their own Jewish community, unless it conflicted with core Jewish laws. This technique allowed Jewish communities to distinguish between indispensable religious laws and more discretionary laws. Over time, they learned which secular laws and practices could be accommodated, and which had to be resisted even at the risk of life and limb. This technique not only led to ample innovation and diversity of Jewish law over time and across cultures. It also enabled the Jews to survive and grow legally even in the face of ample persecution.

In turn, Western democracies—particularly in the aftermath of the Holocaust and in partial recompense for the horrors it visited on the Jews—have gradually come to accommodate core Jewish laws and practices. Today, Western Jews generally get Sabbath day accommodations, access to kosher food, freedom to wear yarmulkes in public places, and recourse to zoning, land use, and building charters for their synagogues, charities, and schools. But all this occurred only in the past two generations, and only after endless litigation and lobbying in state courts and legislatures. At times, even those gains crumble at the edges.

Moreover, Jewish law courts have gained the right to decide some of the domestic and financial affairs of Jews who voluntarily elect to arbitrate their disputes before them. These courts are attractive to Jewish disputants, because they are staffed by highly-trained jurists, conversant with both Jewish and secular law, and sensitive to the bicultural issues being negotiated. Unlike their medieval and early modern predecessors, these modern Jewish law courts leave many issues to the state. They do not claim authority over all of Jewish sex, marriage, and family life, and they have abandoned their traditional authority to impose physical coercion or sanctions. And they claim no authority beyond persuasion to stop a disputant from simply walking out of court and out of the Jewish community altogether.

This story of Jewish accommodation holds three lessons for Shari'a advocates. First, it takes time and patience for a secular legal system to adjust to the realities and needs of new religious groups. The hard-won accommodations enjoyed by modern Jewish law and culture cannot be effortlessly transposed into the Muslim context. These are piecemeal, equitable adjustments to general laws that track the specific needs and experiences of each religious community. Muslims simply do not have the same history of persecution that the Jews have faced in the West. Nor do they have a long enough track record of litigation and lobbying. Concessions and accommodations will come, but only with time, persistence, and patience.

Second, it takes flexibility and innovation on the part of the religious community to win accommodations from secular laws and cultures. Not every religious belief can be claimed as central; not every religious practice can be worth dying for. Over time, and of necessity, diaspora Jewish communities learned to distinguish between what was core and what more penumbral, what was essential and what more discretionary to Jewish legal and cultural identity. Over time, and only grudgingly, Western democracies learned to accommodate the core religious beliefs and practices of Jewish communities. Diaspora Muslim communities in the West need to emulate the Jews. Islamic laws and cultures have

changed dramatically over time and across cultures, and modern day Islam now features immense variety in its legal, religious, and cultural practices. That diversity provides ample opportunity and incentive for Muslim diaspora communities to make the necessary adjustments to Western life, and to sort out what is core and what is more discretionary in their religious lives. Cultural adaptation, not assimilation, is what is needed to earn accommodations from the state.

Third, religious communities, in turn, have to learn to accommodate, or at least tolerate, the core values of their secular host nations if they expect to win concessions for their religious courts and other religious practices. No Western nation will long accommodate, perhaps not even tolerate, a religious community that cannot accept its core values of liberty, equality, and fraternity, or of human rights, democracy, and rule of law. Those who wish to enjoy the freedom and benefits of Western society must also accept the core constitutional and cultural values that make those freedoms and benefits possible.

So far, only a small, brave band of mostly Western-trained Muslim intellectuals and jurists have called for the full embrace of democracy and human rights in and on Muslim terms. These are highly promising arguments. Even more promising are the new political and legal experiments now afoot in the “Arab spring.” It was the early modern revolutions against tyranny that drove the West to develop many of its core democratic and constitutional values that we still cherish. Something similar might eventually emerge from the current revolutions against tyranny in the Arab and broader Muslim world. Over time, Islam might well present a new way of thinking about human rights and democratic government, and a new way of relating law, religion, and the family.

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